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Revised
Bradley BK Register

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 135.

Fraudulent
Preference

WILLIAM W. LATHROP, ASSIGNEE IN BANKRUPTCY OF JAMES W. ADAMS, APPELLANT,

vs.

JOHN DRAKE, DERRICK HULICK, AND SAMUEL DRAKE, NOW OR LATE DOING BUSINESS AS DRAKE, HULICK & CO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED JANUARY 20, 1874.

18 Stat Supp 178

April 10, 1871
Chap 9
Legal Tender

231—

SUPREME COURT OF THE UNITED STATES.

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½ *Docket entries.*

April sessions, 1869.

Hugh W. Tener, D. C. Harrington.
Wm. H. Armstrong, Wm. M. Bull.

WILLIAM W. LATHROP, ASSIGNEE IN BANKruptcy of James W. Adams, *vs.* JOHN DRAKE, DERRICK HULICK, AND SAMUEL Drake, now or late doing business as Drake, Hulick & Co.	75.	In bankruptcy, 20.

1869, September 20. Bill filed. Subpœna exit, returnable on the first Monday of November next.
" November 1. William H. Armstrong and William M. Bull, esquires, appear for respondents.
Subpœna returned served.
" December 6. Answer of defendants filed.
" " 30. Replication filed.
1870, February 5. Appointment of examiner. (See minutes.)
1872, March 18. D. C. Harrington, esq., appears for compl't.
Testimony on part of plaintiff filed.
" December 18. Suggestion of death of John Drake, one of the defendants.
1873, April 26. Bill dismissed.
" December 19. Appeal and affidavit for appeal to the Supreme Court of the United States.
Appeal allowed.

1 In the circuit court of the United States for the eastern district of Pennsylvania.

WILLIAM W. LATHROP, ASSIGNEE IN BANKruptcy of James W. Adams, *vs.* JOHN DRAKE, DERRICK HULICK, AND SAMUEL Drake, now or late trading as Drake, Hulick & Co.	In equity.

Pleas before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, of April sessions, 1869. No. 75.

It is thus contained:

Be it remembered that, on the twentieth day of September, A. D. 1869, Hugh W. Tener, esquire, solicitor for complainant, comes into court here and presents the bill of complaint of William W. Lathrop, assignee in bankruptcy of James W. Adams, vs. John Drake, Derrick Hulick, or Samuel Drake, now or late doing business as Drake, Hulick & Co.; which said bill, being filed, is in the words and of the tenor following, to wit:

2 In the circuit court of the United States.

BETWEEN WILLIAM W. LATHROP, ASSIGNEE in bankruptcy of James W. Adams,
and
JOHN DRAKE, DERRICK HULICK, AND SAMUEL Drake, now or late doing business as Drake, Hulick & Co.

To the honorable the judges of the circuit court of the United States for the eastern district of Pennsylvania:

1. William W. Lathrop, of the borough of Wilkesbarre, Luzerne County and State of Pennsylvania, assignee in bankruptcy of James W. Adams, brings this his bill of complaint against John Drake, Derrick Hulick, and Samuel Drake, now or late partners doing business as Drake, Hulick & Co., and all of Northampton County and State
3 of Pennsylvania; and says,

2. That under and by virtue of the provisions of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, the said James W. Adams was on the seventh day of October, A. D. 1867, adjudged a bankrupt on his own petition by the district court of the United States for the western district of Pennsylvania.

3. That your orator was duly chosen assignee of the estate of said James W. Adams in accordance with section 13 of said act of Congress, and on the twentieth day of December, A. D. 1867, E. N. Willard, esq., one of the registers in bankruptcy in and for said western district of Pennsylvania, by an instrument of writing under his hand, assigned and conveyed to your orator all the estate, real and personal, of the said bankrupt, with all the deeds, books, and papers relating thereto, excepting such property, however, as is exempted from the operation of said assignment by the provisions of the 14th section of said act.

4 4. Your orator further states that on the 27th day of June, A. D. 1867, the said James W. Adams, being insolvent and bankrupt, did confess a judgment in favor of the said respondents for the sum of four thousand one hundred and twenty dollars and fifty-eight cents, and that said respondents caused the same to be entered up in the court of common pleas of said Luzerne County, to No. 389, August term, 1867, and an execution immediately to issue thereon, under and by virtue of which execution the sheriff of said Luzerne County sold the personal property of the said bankrupt on the 5th day of July, 1867, and paid over the proceeds of said sale to said respondents. All which will more fully appear by reference to an exemplified copy of the record of said judgment, hereto annexed, and which your orator craves may be considered part of this bill, and which is marked "Exhibit A."

5. And your orator avers that the said confession of judgment
5 was made by the said bankrupt within four months before filing his petition in bankruptcy, that the said bankrupt was at the time of making said confession of judgment insolvent; that said confession of judgment and sale of said bankrupt's property thereunder was made with a view to give a preference to the said respondents over the other creditors of the said bankrupt, and that the said respondents received said confession of judgment and issued execution thereon, well knowing that the said bankrupt was insolvent, and that such confession of judgment and sale thereunder was made in fraud of the provisions of said

act of Congress, and to delay, defraud, and hinder the other creditors of said bankrupt, and to defeat and delay the operation of said act of Congress.

Your orator, therefore, has need of equitable relief, and your orator prays your honors to decree that the said respondents pay over
6 to your orator the value of the said goods so seized on said execution and sold, with interest, and such other and further relief as to your honors shall seem meet.

WM. W. LATHROP,
Assignee of James W. Adams, a Bankrupt.

HUGH W. TENER,
Solicitor for Complainant.

STATE OF PENNSYLVANIA,
County of Luzerne, ss:

William W. Lathrop being duly sworn according to law, deposes and says that the facts set forth in the foregoing bill are true so far as he speaks of his own knowledge, and that he verily believes them to be true so far as he speaks upon knowledge derived from others.

WM. W. LATHROP.

Sworn and subscribed before me this 16th day of September, 1869.
GUSTAVE HAHN,
U. S. Commissioner.

7 "EXHIBIT A."

STATE OF PENNSYLVANIA,
County of Luzerne, ss:

{ SEAL COURT OF COMMON PLEAS, LUZERNE COUNTY, PA. } Among the records of pleas had before the Hon. John N. Conyngham, president judge, and Geo. P. Steele and Thos. Collins, his associates, judges of a court of common pleas held at Wilkesbarre in and for the said county of Luzerne, for the term commencing the third Monday of August, A. D. 1867, may be found the following:

Hoyt & Loveland.

Continuance docket entry.

JOHN DRAKE, DERRICK HULICK, & SAMUEL Drake, partners doing business as Drake, Hulick & Co., *v.* JAMES W. ADAMS. } 389.

Now, 27th June, 1867, amicable action of debt filed to have the same force and effect as if summons had been regularly issued, served, and returned to May term, 1867, and therewith confession of judgt. by
8 said defendant to the said plffs. for the sum of forty-one hundred and twenty & $\frac{58}{100}$ dollars, with interest from this date, and without stay of execution. Copy of claim filed herewith. (See files I. D., No. 16.)

Now, 31 Dec., 1867, court grant rule on shff. to return the fi. fa. in this case. (See G. M.)

$2.80 pd. by atty.; debt., $4,120.58. Prot. 2.30; com. 50; atty. 3.00—5.80. Int. 27 June, 1867; fi. fa. 158, Aug. 3, 1867, 60; P. P. sale shff. 38.08.

Personal property sale on 5 July, 1867, for $2,939.00.

Now, 30 May, 1868, on motion, Geo. R. Bedford, esq., is appointed an auditor to distribute the proceeds of shff. sale of personal property in above case. (See G. M.) 8 July, 1868, Henry M. Hoyt, p. g., rects. of shff. one hundred and fifty-three dollars on writ, the balance of money in his hands having been heretofore paid to plffs. in this suit. (See fi. fa.)

8 July, 1868, shff. rects. of H. M. Hoyt thirty-eight & $\frac{93}{100}$ dolls. shff.'s & unpaid prot.'s costs on writ. (See fi. fa.)

Judgment docket entry.

DRAKE, HULICK & CO. } No. 389. Aug. 3, 1867.
v. } 27th June, 1867. Judgt.
JAMES W. ADAMS. }

Debt	$4,120 58
Costs	5 80

Date of interest, 27 June, 1867.

Agreement, confession, &c.

In com. pleas. No. Augt. t., 1867.

LUZERNE COUNTY, *ss:*

9 JOHN DRAKE, DERRICK HULICK, AND Saml. Drake, partners, doing business as Drake, Hulick & Co.,
v.
JAMES W. ADAMS.

Enter amicable action of debt to have the same force and effect as if summons had been regularly issued, served, and returned to May term, 1867, and therewith confession of judgment by said defendant to said plaintiffs for the sum of forty-one hundred and twenty $\frac{58}{100}$ dollars, with interest from this date and without stay of execution.

Witness our hands this 27 June, 1867.

DRAKE, HULICK & CO.
J. W. ADAMS.

In presence of—
HENRY M. HOYT.

[Int. rev. stamp 5-c.]

The parties herewith file copies of notes, accounts, &c., upon which the above action is founded.

$1,085$\frac{27}{100}$. WHITE HAVEN, *January* 30, 1867.

Ninety days after date, I promise to pay to the order of Drake, Hulick & Co., ten hundred and eighty-five $\frac{27}{100}$ dollars, without defalcation, value received, payable at 1st Nat. Bank, Mauch Chunk.

(Signed) J. W. ADAMS.

James W. Adams to Drake, Hulick & Co. DR.

To amt. of bill from Nov. 1st, 1866, to Apl. 2, 1867			$1,451 47
Int			20 56
10 Cash advanced 25 June, 1867, to sheriff of Luzerne County			$1,553 52
Note		$1,085 27	
Int		9 70	
Acct		1,451 47	
Int		24 56	
Advances		1,553 52	
			$4,120 58

Prot. will file the same.

DRAKE, HULICK & CO.
J. W. ADAMS.

(Endorsed:) No. 389. Augt. t., 1867. Drake, Hulick & Co. v. James W. Adams. Am. act. with confession of judgt. Debt, $4,120 58. Int. 27 June, '67. Filed June 27, 1867. Fees pd. by atty., fi. fa. 158, Aug. 5, 1867. Hoyt & Loveland.

Præcipe for fi fa.

In com. pleas. Aug. t., 1867.

DRAKE, HULICK & Co. *vs.* JAMES W. ADAMS. } No. 389.

Issue fi. fa. to Aug. t., 1867.

HOYT & LOVELAND, *Attys. p. q.*

(Endorsed:) 158. Aug. t., 1867. Filed 27 June, 1867.

11 *Fi. fa.*

LUZERNE COUNTY, *ss:*

[SEAL.] The Commonwealth of Pennsylvania to the sheriff of said county, greeting:

We command you that of the goods and chattels, lands and tenements of J. W. Adams, late of your county, yeoman, in your bailiwick, you cause to be levied as well a certain debt of forty-one hundred & twenty $\frac{58}{100}$ dollars, which John Drake, Derrick Hulick, & Sam'l Drake, partners, doing business as Drake, Hulick & Co., lately in our county court of common pleas of Luzerne County, before our judges at Wilkesbarre, recovered against him, as five & $\frac{80}{100}$ dollars, which in our said court were adjudged for their damages, which they sustained by occasion of the detention of that debt. And have you these moneys before our judges, at Wilkesbarre, at our county court of common pleas, there to be held for the county of Luzerne on the 3rd Monday of August next, to render the said plaintiffs their debt and damages aforesaid, whereof the defendant is convict, as appears of record, &c.; and have you then and there this writ.

Witness the Hon. John W. Conyngham, president of said court, at Wilkesbarre, the 27 day of June, in the year of our Lord one thousand eight hundred and sixty-seven.

M. J. PHILBIN, *Prothonotary.*
Per WILLIVER.

12 (Endorsement of fi. fa.:) No. 158, Aug. term, 1867. Drake, Hulick & Co. vs. Jas. W. Adams. Fi. fa. Returnable to Aug. term, 1867. Debt penal, ; debt real, $4,120.58. Pro., 2.30; com., .50—pd. by atty; atty., 3.00—5.80; int., 27 June, 1867; fi. fa. .60; sat., .15—$6.55. No. 389, Aug. term, 1867. Hoyt & Loveland, p. q.

Sheriff Van Lear's fees: Travel, 2.00; ex. writ, .90; levy, .90; advertising, 2.70; travel on sale, 2.00; crying sale, .90; poundage, 27.23; settling writ, 1.20; return, .25—$38.08.

Recd. at 11 a. m. 27 June, 1867.

J. E. VAN LEAR, *Shff.*

Recd. 8 July, 1868, of Shff. Vanleer, one hundred and fifty-three dollars on this writ, the balance of monies in his hands having been heretofore paid to the plaintiff in this writ.

HENRY M. HOYT,
Atty. for Plaintiffs.

Recd. 8 July, 1868, of H. M. Hoyt, thirty-eight & $\frac{93}{100}$ dollars, shff.'s & unpaid prot.'s costs on this writ.

J. E. VAN LEER, *Shff.*,
Per B. F. LOUDER, *Deputy.*

13 *Return of fi. fa.*

To the hon. the judges within named:

I do hereby certify that, by virtue of the annexed writ, to me directed, I have seized and taken in execution the goods and chattels in the annexed schedule set forth, and after due legal and timely public notice by me given to the time and place of sale, to take place at the store and premises of James W. Adams, situate at White Haven Boro, Luz. Co., Penna., on Friday, the 5th day of July, 1867, at 10 o'clock a. m., at which time and place I did expose said goods and chattels to sale by public vendue or outcry, and sold the same to certain parties whose names appear in the said schedule, they being the highest and best bidders, and the highest and best price bidden for the same, for which monies, after deducting costs, I hold the receipt of the attorney for plaintiff.

Shff.'s office, Wilkesbarre, 5 July, 1867.

So answers—

J. E. VAN LEER, *Shff.*

14 *Outside of store.*

One spring wagon, sold to Drake & Hulick	$65 00
One sulkey " " " "	15 00
One covered spring carriage " "	60 00
One sleigh " "	15 00
One bay horse " "	100 00
One sett double harness, James Belles	20 00
" " " " Cyrus Stark	40 00
One sett harness, Charles Forschner	7 00
Three barrels flour, Cyrus Stark	55 00
Two " " J. B. Wasser	21 00
One cast-iron safe, Carn & Brothers	30 00
One saddle and bridle, Drake, Hulick & Co	5 00
	$414 00

Contents of store.

134 pr. boots.
180 " shoes.
40 pie. calico.
9 " gingham.
12 " muslin.
6 " jean.
34 " delaines.
19 " alapacca.
3 " check.
5 " drilling.
4 balmorals.
26 shawls.
6 pieces merino.
6 " gauze.
3 " cotton-velvet.
10 " mull muslin.
17 " cotton-wraps.
29 vest-patterns.
16 pants "
5 pair pants.
15 59 boxes hats & caps.
17 chambers.
3 setts dishes.
10 wash-bowls & pitchers.
18 doz. plates.
49 pitchers.
2 spittoons.
2 potato-dishes.
6 doz. tumblers.
9 lamps.
25 packs cutlery.
1 lot screws, locks, &c.
Saws, augurs, &c.
33 brushes.
10 jars of drugs.
6 pair hames.
5 spades.
1 lot boots & shoes.
8 baskets.
3 pieces farmer satinett.
20 " dress-lining.
3 " diaper.
32 " flannel.
10 " cashmere.
Tobacco, tea, coffee, saleratus, rice, cherries, crackers, sugar, soap, corn-starch, raisins, beans.
6 lbs. flour.
4 doz. axe-handles.
2 doz, brooms, 2 sacks salt.
Lot fine salt.
1 showcase & contents.
Collars, neckties.
87 drawers & shirts.
26 boxes hosiery.
27 " glass.
4 doz. school-books.
1 letter-press.

6 boxes suspenders.
Lot hdkfs., ribbons, dress-buttons, &c.
25 packages buttons.
9 looking-glasses.
9 umbrellas, lot cotton-laps.
Lot buck-skin gloves & mits.
5 casks molasses.
1½ bbls. mackerel.
7 shoulders.
200 lbs. codfish, 1 doz. axes.
4 broad-axes, 6 oil & vinegar.
15 whips, 11 hame-straps, &
3 halters.

Same all sold to Drake & Hulick & Co. for two thousand five hundred and twenty-five dollars, ($2,525.00.)

16 (From G. M.)

DRAKE, HULICK & Co. v. J. W. ADAMS. } No. 389, Aug. t., 1867. Fi. fa., No. 158, Aug. t., '67.

Now, 31st Dec., 1867, court grant rule upon Joseph E. Van Leer, shff., to return the fi. fa. in this case.

(From G. M.)

DRAKE, HULICK & Co. v. J. W. ADAMS. } No. 389, Aug. t., 1867. Fi. fa. to No. 158, Aug. t., 1867.

30 May, 1868, on motion George R. Bedford, esq., is appointed an auditor to distribute the proceeds of shff.'s sale of personal property in above case.

STATE OF PENNSYLVANIA,
County of Luzerne, ss :

{SEAL OF COURT OF COM. PLEAS, LUZERNE CO.} I, Michael J. Philbin, prothonotary of the court of common pleas in and for said county, do hereby certify that the above and aforegoing is a true and perfect copy of the whole record of the case therein stated, as full and entire as the same now remain of record and on file in
17 said court; and I do further certify that no report of the auditor appointed to distribute proceeds of sheriff's sale on fi. fa. No. 158, Aug. t., 1867, above mentioned, has ever been filed in this office.

Witness my hand and the seal of said court at Wilkesbarre, this thirtieth day of August, A. D.

M. J. PHILBIN,
Prothonotary.

STATE OF PENNSYLVANIA,
County of Luzerne, ss :

I, John N. Conyngham, president judge of the court of common pleas for the county of Luzerne, in the said State, do hereby certify that the above-named M. J. Philbin, by whom the foregoing attestation was made, was at the time of so making the same, and is now, prothonotary of the said court, duly commissioned and qualified, to all whose acts, as such, full faith and credit are and ought to be given, as well in courts of *in-*
dicature as elsewhere; that the seal thereto attached is the seal of
18 the said court, and that the said attestation so made by him is in due form.

In testimony whereof I have hereunto set my hand this first day of September, A. D. 1869.

JOHN N. CONYNGHAM,
Prest. Judge, &c.

And thereupon afterwards, to wit, on the 20th day of September, A. D. 1869, a writ of subpœna is issued in the words and figures following, to wit:

19 UNITED STATES,
Eastern District of Pennsylvania, sct :

The President of the United States, to John Drake, Derrick Hulick, and Samuel Drake, now or late doing business as Drake, Hulick & Co.:

For certain causes offered before the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, we command and strictly enjoin you, and each of you, that, laying all other matters aside, and notwithstanding any excuse, you and each of you personally be and appear before the judges of the said court, at a session of the same court, to be holden at Philadelphia, on the first Monday of November next, to answer concerning those things which shall then and there be objected against you, and to do further and receive what the said court shall have considered in this behalf. And have you then there this writ. And this you are in nowise to omit, under the penalty of four hundred dollars.

Witness the honorable Salmon P. Chase, Chief-Justice of the Supreme Court of the United States, at Philadelphia, this twentieth day of Sep-

tember, 1869, and in the ninety-fourth year of the Independence of the said United States.

W. GRIER HIBLER,
Pro Clerk of Circuit Court, U. S.

NOTE.—The defendants in this case are required to enter their appearance in the clerk's office of said court on or before the first Monday of November next, otherwise the bill may be taken pro confesso.

Served the within writ personally on the within-named defendants by making known the contents thereof to them, and by leaving with each of them true and attested.
Sept. 27th, 1869.
So answers—

E. M. GREGORY,
U. S. Marshal.

(Indorsed:) No. 75. Circuit court, April sess., 1869. William W. Lathrop, assignee in bankruptcy of James W. Adams, vs. Drake, Hulick & Co. Subpœna in equity. Returnable on the first Monday of November next. "E." Hugh W. Tener, solicitor for complainant. $2.40. Filed 1 November, 1869.

20 And thereupon, afterwards, to wit, on the sixth day of December, 1869, the said respondents, John Drake, Derrick Hulick, and Samuel Drake, by their attorneys, Wm. M. Bull and W. H. Armstrong, esquires, come into court here, and file their answer, which being read, is as follows, to wit:

In the circuit court of the United States for the eastern district of Pennsylvania. In equity.

BETWEEN WILLIAM W. LATHROP, ASSIGNEE in bankruptcy of James W. Adams,
and
JOHN DRAKE, DERRICK HULICK, AND SAMUEL Drake, now or late doing business as Drake, Hulick & Co.

To the honorable the judges of the circuit court of the United States for the eastern district of Pennsylvania:

The joint and several answer of John Drake, Derrick Hulick, and Samuel Drake, now & late partners doing business as Drake, Hulick & Co., the defendants to the bill of complaint of William W. Lathrop, assignee in bankruptcy of James W. Adams, complainant.

These defendants, now and at all times hereafter, saving and reserving unto themselves all benefit and advantage of exception, which
21 can or may be had to the many errors, uncertainties, and other imperfections in the said complainant's bill of complaint contained, for answer thereunto, or unto so much and such parts thereof as these defendants are advised is or are material or necessary for them to make answer unto, these defendants severally answering say:

That they, or any or either of them, to the knowledge or belief of the others or other of them, do not know and have never been informed

save by the said complainant's bill, and cannot set forth as to their belief or otherwise, whether the said James W. Adams was adjudged a bankrupt upon his own petition, as set forth in the said complainant's bill, these said defendants, or any or either of them, having received no notice at any time of such bankruptcy.

That they or any of them, or either of them, to the knowledge or belief of the others or other of them, do not know and have never been informed save by the said complainant's bill, and cannot set forth as to their belief or otherwise whether the said William W. Lathrop was chosen assignee of the estate of the said James W. Adams, as
22 mentioned in the said complainant's bill, and whether an assignment of the estate of the said James W. Adams to the said William W. Lathrop by E. N. Willard, esq., a register in bankruptcy, as set forth in the third paragraph of the said complainant's bill.

And these defendants, further severally answering, say that it is true that on the twenty-fourth day of June, A. D. 1867, the said James W. Adams did confess a judgment in favor of the said defendant for the sum of four thousand one hundred and twenty dollars and fifty-eight cents, and that the said defendants caused the same to be entered up in the court of common pleas of said Luzerne County to No. 389, August term, 1867, and an execution to issue thereon, under and by virtue of which execution the sheriff of said Luzerne County sold the personal property of the said James W. Adams on the fifth day of July, A. D. 1867, and paid over the proceeds of said sale to these defendants, as mentioned and set forth in the said complainant's bill and in the exemplification marked "Exhibit A," & filed with the said complain-
23 ant's bill as part thereof, but that these defendants deny, according to the best of their knowledge, information, and belief, that the said James W. Adams was insolvent and bankrupt at the time of the said confession of judgment, as alleged in the said complainant's bill.

And these defendants, in further answer, further severally say that they, or any or either of them, to the knowledge, information, or belief of any or either of *of* the others or other of them, do not know and cannot set forth as to their belief or otherwise whether the said confession of judgment was made by the said alleged bankrupt within four months of the filing of his petition in bankruptcy as alleged in the said complainant's bill, but that these defendants deny, according to the best of their knowledge, information, and belief, that the said James W. Adams was insolvent and bankrupt at the time of the said confession of judgment as alleged in the said complainant's bill; that they further severally deny that the said confession of judgment and sale thereunder was made of the property of the said James W. Adams, alleged
24 to be bankrupt by the said complainant's bill, with a view to give a preference to these defendants over other creditors of the said alleged bankrupt as set forth in the said complainant's bill, and that they, the said defendants, further severally deny that the said confession of judgment was given by the said alleged bankrupt and sale made thereunder in fraud of the provisions of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, and to delay, defraud, and hinder the other creditors of the said alleged bankrupt, and to defeat and delay the operation of the said act of Congress, as set forth in the said complainant's bill; all which denials are made according to the best of the knowledge, information, and belief of these defendants.

And these defendants, in further answer, severally say that the said

confession of judgment was given by the said James W. Adams to secure an existing indebtedness, amounting to the sum of four thou-
25 sand one hundred & twenty dollars & fifty-eight cents, and already incurred by the said James W. Adams to these defendants, after repeated and pressing demands for payment by these said defendants and upon their urgent solicitations, and that the said execution thereunder was caused to be issued by these said defendants of their own motion, and without any consultation or collusion with the said James W. Adams, and that the sale under the said execution and payment of the proceeds to these defendants was made under the direction of these defendants without any consultation or collusion whatever with the said James W. Adams.

And these defendants further severally say that they did not, nor did either of them or any of them, to the knowledge or belief of themselves, or of the other or others of them, receive said confession of judgment and issue execution thereon, knowing that the said alleged bankrupt was insolvent and bankrupt as alleged in the said complainant's bill, and that such confession of judgment was made in fraud of the
26 said act of Congress, and to delay, defraud, and hinder the other creditors of the said alleged bankrupt, and to defeat and delay the operation of said act of Congress, as alleged in the said complainant's bill; but that they, these defendants, were led to believe by the letters and representations of the said James W. Adams, and did actually believe, that he was solvent at the time of the confession of the said judgment, and was worth, over and above all his indebtedness, the sum of seven thousand dollars, and that they had reason so to believe. That subsequently to the confession of judgment aforesaid, still believing him, the said James W. Adams, to be solvent, and acting upon that belief, on the twenty-first (21st) day of September, A. D. 1867, they, the said defendants, sold to the said James W. Adams a bill of goods to the amount of three hundred & thirty-four dollars and eighty-one cents upon four months' credit, and that the said James W. Adams afterwards paid them, these defendants, for the said goods, besides other bills sold to the said J. W. Adams at subsequent dates.

27 And these defendants severally deny all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged, without this, that there is any other matter, cause, or thing in the said complainant's bill of complaint contained material or necessary for these defendants to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge or belief of these defendants, or of any or of either of them; all which matters *and* these defendants are ready and willing to aver, maintain, and prove, as your honors shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

WM. M. BULL,
W. H. ARMSTRONG,
Attys. for Defts.

28 COMMONWEALTH OF PENNSYLVANIA,
Northampton County, ss:

Before me, the subscriber, president judge of the third judicial district of Pennsylvania, and president judge of the court of common pleas of the said county, personally appeared John Drake, Derrick Hulick, and Samuel Drake, who being severally duly sworn according to law, do severally depose and say, that *that* the facts set forth in the foregoing

answer, so far as they are stated from their own knowledge, are true, and so far as they are stated from information, they believe them to be true.

JOHN DRAKE.
DERRICK HULICK.
SAMUEL DRAKE.

Sworn and subscribed this 30th day of October, A. D. 1869, before me,

A. B. LONGAKER,
Prest. Judge 3rd Dist. Pa.

29 And afterwards, to wit, on the 30th day of December, 1869, the said complainant, by his attorney Hugh W. Tener, esq., comes into court here and files his replication, in the words and tenor following, to wit:

C. C. U. S., E. D. of Pa., in equity. April sessions, 1869.

LATHROP, ASSIGNEE, &C., *vs.* DRAKE ET AL. } No. 75.

The replication of said complainant to the answer of said defendants.

This repliant, saving and reserving unto himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto, saith that he will aver and prove his said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue,
30 and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true. All which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

HUGH W. TENER,
Solicitor for Complt.

31 And thereupon afterwards, to wit, on the eighteenth day of March, A. D. 1872, the said complainant, by Hugh W. Tener, esq., his attorney, presents and files the testimony of James W. Adams, which being read is as follows, to wit:

In the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit.

WILLIAM W. LATHROP, ASSIGNEE OF JAMES W. ADAMS, a bankrupt, *vs.* JOHN DRAKE, DERRICK HULICK, AND SAMUEL Drake, trading as Drake, Hulick & Co. } No. 75. April sess. 1869.

Examination of witnesses on behalf of complainant under 67' rule in equity as amended, taken by W. Grier Hibler, U. S. commissioner, at

his office, No. 435 Library street, in the city of Philadelphia, on the 27th day of October, A. D. 1870. Present Hugh W. Tener, esq., for compt.; W. M. Bull and W. H. Armstrong, esqs., for respondent.

JAMES W. ADAMS, being duly sworn, says: My name is James
32 W. Adams; I reside at present in Clinton Co., Penna.; in June, 1867, I resided at White Haven, Luzerne Co., Pa.; at that time I was engaged in mercantile business in borough of White Haven, regular country store.

At that time my liabilities for merchandize bought I owed about 9,000 dollars. There were executions issued against me by A. Coran & Co., of Phila., for about 600$ and Henry Bloss, of Northampton Co., for about 800.00 or 900.00; the two executions amounted to about 1500. A friend of mine by name of Mr. Stark paid sheriff. I had no money and was unable to pay the money. I wrote to Drake, Hulick & Co., of Easton, creditors of mine, that I was in trouble and they should come up. I owed them a pretty large amount. Mr. John Drake of that firm came up to White Haven the next day; I then informed Mr. Drake of these executions and of my inability to pay them. I gave him an account of my assetts and liabilities as near as I could. I wanted them to loan me the money to pay the executions or to pay the executions them-
33 selves for me. Mr. Drake said he would assist me in some way, but in what way he could not tell till he went to Wilkesbarre and consulted his lawyer. He went and came back, and the agreement was that I should give them a judgment for what I owed them and for this $1,500 in addition, making about $4,000.00. I gave a judgment note for that amount. They issued execution and the sheriff levied on me in a very short time—all the goods I had in the store, the fixtures, horses, and wagons and all my property there subject to execution.

I was not there at the sale. The young man who clerked continued on. I don't know who he was acting for, except what he told me. On a Saturday Mr. Hulick and Mr. Drake were there when I went home, and were about closing out the stock at auction. They told me they had received about enough to satisfy their claim.

34 In addition to their claim I owed about $5,000 to other parties.

Cross-examined by Mr. Bull:

I went with Mr. Drake to Mr. Hoyt's office, a lawyer in Wilkesbarre. Mr. Drake and Mr. Hoyt had a private talk, and then Mr. Drake said he would pay the $1500 if I would confess judgment. I made a proposal to Mr. Drake, when he came up to White Haven, that if he would pay these executions I would give him a judgment for the whole amount of his claim, amounting to about 4,100, including this 1,500. I am not certain but that Mr. Drake wanted me to take advantage of the bankrupt act. But I said I did not consider myself that bad off, for my debts were not equal to my assetts. My outstanding accounts at that time were about $23,000. I think I stated that to Mr. Drake. I think I told him that Lilly & Palmer owed me about $12,000. I had a claim against this man Bloss for about $2,500 or $3,000 *dollars*, and against
35 others to, in all, about the $23,000. At the time I thought my store-goods worth about $8,000, and told Mr. Drake I thought so. The 8,000 store-goods was in addition to my other assetts. This was in June, 1867, at the time the judgment was confessed. Two or three months after this judgment they sold me goods on two occasions, the first in September and the other in the early part of the winter. When I ordered the goods they were ordered for Clinton Co., Renovo. I bought them individually. I did not consider myself bankrupt on the

24 June, 1867. I think likely I told Mr. Drake that if I had all my business settled up I would have about $8,000 left. I think I told Mr. Drake the Bloos judgment was not owed by me. I afterwards sued Bloos and recovered $1,000, the amount agreed on between the lawyers, at which I was dissatisfied. Mr. Lathrop, assignee in bank-
36 ruptcy, sued Bloos I mean. I told Mr. Drake I had plenty of property, all I wanted was time to collect in some debts.

Re-examined by Mr. Tener:

In Sept. 24th, 1867, I filed my petition in bankruptcy at Williamsport. It was about that time I got the first bill of goods for Renova. I do not owe for those goods now. I paid for them. I asked them to sell me the goods on time, and I would pay when I could, as I had got this job at Renova. I do not know whether my other creditors received anything yet or not. Mr. Lathrop told me he collected in some. I went into bankruptcy because I could not realize out of my assets sufficient money to pay my debts with. That was my reason for going into bankruptcy. I wanted to avoid the property being sacrificed by the sheriff was the reason I confessed judgment to Mr. Drake. I
37 think I told Mr. Drake that I had no money for the goods at Renova, and he let me have them, depending on my honesty to pay for them, I suppose.

JAS. W. ADAMS.

Sworn to and subscribed before me this 27 day of October, A. D. 1870.

W. GRIER HIBLER,
U. S. Commissioner.

38 And afterwards, to wit, on the 18th day of December, 1872, Messrs. Bull and Armstrong, esquires, attorneys for respondents, file suggestion of death of John Drake as follows, to wit:

C. C. U. S., E. D. of Penna. In equity. Ap. sess., 1869.

WM. W. LATHROP, ASSIGNEE OF JAMES W. Adams,
vs.
JOHN DRAKE, DERRICK HULICK, AND SAMUEL Drake, now or late doing business as Drake, Hulick & Co. } No. 75.

The death of John Drake, one of the parties defendant, is suggested of record.

BULL,
ARMSTRONG,
For Def.

Decree.

And afterwards, to wit, on the 26th day of April, A. D. 1873, this case having argued by counsel for the respective parties, it is ordered, adjudged, and decreed, that the bill be, and is hereby, dismissed.

39 And afterwards, to wit, on the 19th day of December, 1873, the complainant, by F. Carroll Brewster, esq., presents and files

his appeal and affidavit for appeal to the Supreme Court of the United States, in the words following, to wit:

Circuit court of U. S. for the 3rd circuit, April term, 1869.

W. W. LATHROP, ASSIGNEE OF J. W. ADAMS, a bankrupt,
vs.
DRAKE, HULICK & CO. } No. 75.

And now, Dec. 19, 1873, the complainant appeals from the final decree of the circuit court dismissing the bill to the Supreme of the United States.

W. W. LATHROP,
Assignee of J. W. Adams, a bankrupt.

W. W. Lathrop, the appellant, having been duly sworn according to law, doth depose & say that the above appeal is not intended for delay, & that the amount in controversey exceeds two thousand dollars.

W. W. LATHROP.

Sworn & subscribed before me November 8th, 1873.
[SEAL U. S. COMMR.]
GUSTAV HAHN,
United States Commissioner.

40 And now, Dec. 19th, 1873, the above appeal allowed. Appellant to enter security in $ two hundred dollars, and John Riegel, No. 1734 Green street, Philadelphia, approved, and David W. Derr, 432 North 7th st.

41 UNITED STATES OF AMERICA,
Eastern district of Pennsylvania, set:

I, Samuel Bell, clerk, do hereby certify the forgoing to be a true and faithful copy of the record and proceedings of the circuit court of the United States in and for the eastern district of Pennsylvainia, in the third circuit, in a certain suit therein lately depending between W. W. Lathrop, assignee of James W. Adams, bankrupt, complainant, and John Drake, Derrick Hulick, and Samuel Drake, doing business as Drake, Hulick and Company, respondents, of April sessions, 1869, No. 75, in equity.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said circuit court, at Philadelphia, this sixth day of January, A. D. 1874, and in the 98th year of the Independence of the said United States.

[SEAL.]
SAMUEL BELL,
Clerk Cir. Ct. U. S., E. D. of Pa.

(Indorsement on cover:) No. 135. William W. Lathrop, assignee in bankruptcy of James W. Adams, appellant, vs. John Drake, Derrick Hulick, and Samuel Drake, now or late doing business as Drake, Hulick & Co. E. Pennsylvania C. C. U. S. Filed 20th January, 1874.

Supreme Court of the United States.

October Term, 1875. No. 135.

WM. W. LATHROP, Assignee in Bankruptcy of JAMES W. ADAMS, Appellant.

vs.

JOHN DRAKE, DERRICK HULICK, and SAMUEL DRAKE, Now, or late doing business as DRAKE, HULICK & CO.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Brief of Argument for Appellant.

DAVID C. HARRINGTON,
F. CARROLL BREWSTER.
for Appellant.

Supreme Court of the United States.

NO. 135.

WILLIAM W. LATHROP, Assignee in Bankruptcy of James N. Adams, Appellant,

vs.

JOHN DRAKE, DERRICK HULICK and SAMUEL DRAKE, now or late doing business as DRAKE, HULICK & CO.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

BRIEF OF ARGUMENT FOR APPELLANT.

This action was commenced by bill in equity in the Circuit Court of the United States for the Eastern District of Pennsylvania. The defendants filed a general answer, denying the equities of the bill. Testimony was taken and bill set down for a hearing. Upon the argument the defendants raised objection, orally, to the jurisdiction of the Court, and the Court dismissed the bill without filing an opinion. The bankrupt, J. W. Adams, resided in the Western District of Pennsylvania, was adjudged a bankrupt there, and his Assignee also resides there. The defendants reside in the Eastern District. These facts are set forth in the bill. (See page 2 of the Record.)

The questions, therefore, are:

I. Had the Circuit Court for the Eastern District jurisdiction?

II. Could the defendants take advantage of the want of jurisdiction upon the argument on the merits?

III. The effect of subsequent legislation, giving the Circuit Court undoubted jurisdiction.

IV. The question upon its merits as to the right of the plaintiffs to recover.

The Act of Congress, approved May 4, 1858, §1 (11 Stat. 272; Brightly's Supp. 1857–1869, p. 511, § 1) provides thus: "All suits not of a local nature hereafter to be brought in "the Circuit and District Courts of the United States in a "District in any State containing more than one District, "against a single defendant, shall be brought in the District "in which the defendant resides."

See *Revised Stat. of U. S. p.* 139, *sec.* 739.

As suit could only be brought in the Eastern District, had the Circuit Court jurisdiction?

The Bankrupt Act of 1867 gives the several District Courts of the United States jurisdiction in all cases for the collection of assets. *Vol.* 2 *Br. Digest, p.* 74, *pl.* 2.

It also provides that the Circuit Court in the districts where the proceedings in bankruptcy shall be pending shall have a general superintendence and jurisdiction of all cases and questions arising under the Act. *Ibid. p.* 75, *pl.* 4.

And that "Said Circuit Courts shall also have concurrent "jurisdiction, with the District Courts of the same District, of "all suits at law or in equity which may or shall be brought "by the assignee in bankruptcy, &c." *Ibid. pl.* 5.

In *Goodall* v. *Tuttle*, 7 *Bank. Reg. Reports*, 193, an action brought by an assignee of a bankrupt for collection of the assets, in a District Court, other than where the proceedings in bankruptcy were pending, upon objection being made to the want of jurisdiction, Hopkins, J., sustained the action and gave judgment for the plaintiff.

The jurisdiction of the District Courts in suits for collection of assets in Districts other than where the proceedings are pending, have been sustained by the Supreme Court.

Shearman v. *Bingham*, 7 *Bank. Reg.* 490.

In *Goodall* v. *Tuttle*, the Court did not undertake to define with accuracy the character or extent of the jurisdiction of the Circuit Court under the second section, as it was not considered necessary. *See p.* 201. Nor did the question arise in *Shearman* v. *Bingham.*

The Bankrupt Act of 1841, sec. 8, chap. 9, provided "That "the Circuit Court within and for the District where the de- "cree in bankruptcy is passed shall have concurrent jurisdic- "tion with the District Court of the same District of all suits "at law or equity which may or shall be brought by any assignee of the bankrupt," &c.

No case is reported as having arisen under this Act of suits in Circuit Courts other than in the District where the decree in bankruptcy was made.

Judge Story, in *Mitchell* v. *Great Works Milling and Manufacturing Co.*, 2 *Story C. C. R.* 648, sustained the jurisdiction of the Circuit Court over an action for the recovery of assets, by bill alleging a preference, and after referring to the necessity for Congress providing for the enforcing of the Act in the United States, concludes the opinion, p. 661, "And indeed, as it is a concurrent jurisdiction with the Dis- "trict Court (designed, doubtless, to aid that Court in cases of

"grave doubt and difficulty), it shows that this very class of "cases was deemed to be within the jurisdiction of the Dis- "trict, by virtue of the 6th section of the Act already re- ferred to. "*Each section reflects a strong light upon the* "*other, and establishes the intention of Congress to be that its* "*own Courts should possess a plenary jurisdiction over all* "*cases and controversies connected with and growing out of* "*any bankruptcy.*"

To the same effect is the opinion of McLean, J., in *McLean* v. *Lafayette Bank*, 3 *McLean R.* 190.

The Act of 1841 differs in phraseology from the Act of 1867, and it is respectfully submitted, that under the word- ing of the Act of 1867 the Circuit Courts of the United States have jurisdiction. That as the State Courts cannot be com- pelled to exercise jurisdiction, the policy of the law is to give it to the United States Courts.

Act of 1841 provides:

"That the Circuit Court within and for the District where the decree in bankrupt- cy is passed shall have concur- rent jurisdiction with the Dis- trict Court of the same Dis- trict of all suits at law or equity which may be brought by any assignee," &c.

Act of 1867 provides:

"Said Circuit Courts shall also have concurrent jurisdic- tion with the District Court of the same District of all suits at law or in equity which may or shall be brought by the as- signee," &c.

The Court, in construing the law, should give it such con- struction as would advance the remedy and afford the relief intended to be secured by the Act. Such is the familiar law upon the question of construing statutes.

See cases cited in *Goodall* v. *Tuttle*, 7 *Bank Reg. p.* 208.

As all District Courts have jurisdiction of suits brought for

the collection of assets, it is submitted that the wording of the Act is sufficient to give the Circuit Courts jurisdiction, as the word "same" applies equally to all Courts, and does not restrict and limit it to the District where the proceedings in bankruptcy are pending.

The Third Circuit is composed of the States of Pennsylvania, New Jersey and Delaware. The same Judge presides in all the sessions of the Court within the Circuit. The Circuit Court in Philadelphia being the same that sits in Pittsburgh, where the proceedings in bankruptcy are pending, is literally the Circuit Court of the same District having jurisdiction of the bankrupt.

II. Can the defendants take advantage of the want of jurisdiction upon the argument of the case on its merits?

The defendants have answered the bill; it has been referred to an Examiner, and the case is ready for a hearing. The question of jurisdiction should be raised by plea.

Adams v. *White*, 2 *Pittsburgh Reports*, 21.
Dodge Exrs. v. *Perkins*, 4 *Mason*, 437.
De Wolf v. *Rowland*, 1 *Peters*, 477.
Evans v. *Lee*, 11 *Peters*, 80.
Ivins v. *Hundley*, 6 *Howard*, 1.
Smith et al. v. *Kernochan*, 7 *Howard*, 198.

By answering, the defendants admit that the plaintiff is rightfully in Court, and assumes that the Court has jurisdiction over the parties, to hear and dispose of the case according to the principles of equity. *Ibid.*

By submitting to answer, the defendants have waived their right to question the jurisdiction of the Court.

III. The effect of subsequent legislation giving the Circuit Court undoubted jurisdiction.

Under the act of 1867, as amended in 1875, there can be no doubt of the jurisdiction of the Circuit Courts.

As to the effect of such legislation, see

Hepburn v. *Curts*, 7 *Watts*, 300.
Taggart v. *McGirr*, 2 *Harris*, 155.

By Act 26th April, 1850, Purdon 38, pl. 9, the Legislature provided, that when the title of a plaintiff in ejectment may have been changed by sale or assignment after suit brought, the suit shall not be affected, but the purchaser or assignee may prosecute such action and be substituted as plaintiff. The Supreme Court determined the Act applied to actions pending, as well as to suits subsequently commenced.

Alden v. *Grove*, 6 *Harris*, 377.

IV. The question upon its merits as to the plaintiff's right to recover.

Section XXXV of the Bankrupt Act provides: If an insolvent party gives a preference to a party having a reasonable cause to believe the debtor to be insolvent within four months before filing of petition, it is void.

Revised Statutes p. 996, *sect.* 5128.

Insolvency is inability to pay debts in the ordinary course of business.

A merchant who permits his whole stock in trade to be taken in execution for debt is insolvent.

Bump. Bankrupt Law, 470.

And burden of proof is on the creditor, and not on the assignee.

Toof v. *Martin*, 6 *B. R.* 49.
Toof v. *Martin*, 13 *Wallace*, 40.
Traders' Bank v. *Campbell*, 14 Wallace, 87.
Walbrun v. *Babbitt*, 16 *Wallace*, 577.

Two things must concur, viz: a fraudulent design on the part of the bankrupt, and knowledge or reasonable cause to believe it existed on the part of the vendee.

Tiffany v. *Lucas*, 15 *Wall* 410.
Buchanan v. *Smith*, 16 *Wall* 277.
Mays v. *Fretton*, 20 *Wall* 414.
Wilson v. *City Bank*, 17 *Wall* 473.

Sale of entire stock of goods of a retail merchant is void.

Wager v. *Hall*, 16 *Wallace* 5.

When plaintiff makes a *prima facie* case, the purchaser must show good faith, and that he has taken all reasonable means to ascertain pecuniary condition of vendor.

Walbrun v. *Babbitt*, 16 *Wallace* 577.

And where the creditor has reasonable cause to believe the debtor insolvent, and the debtor suffers or procures the creditor to get a preference, it is void.

Buchanan v. *Smith*, 16 *Wallace* 277.

The testimony, which is brief, fully establishes the fact that Mr. Adams was insolvent, that this was communicated to defendants, and a preference was given, pursuant to an arrangement between the parties.

It is therefore submitted that the decree below should be reversed, and that judgment should be here entered for the assignee.

DAVID C. HARRINGTON,
F. CARROLL BREWSTER,
for Appellant.

Supreme Court of the United States.

October Term, 1875. No. 135.

WILLIAM W. LATHROP, Assignee in Bankruptcy of JAMES W. ADAMS, Appellant,

vs.

JOHN DRAKE, DERRICK HULICK, and SAMUEL DRAKE, Now, or late doing business as DRAKE, HULICK & CO., Appellees.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Brief of Argument for Appellees.

W. H. ARMSTRONG,
for Appellees.

Supreme Court of the United States.

NO. 135.

WILLIAM W. LATHROP, Assignee in Bankruptcy of James W. Adams, Appellant,

vs.

JOHN DRAKE, DERRICK HULICK and SAMUEL DRAKE, now or late doing business as DRAKE, HULICK & Co., Appellees.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

BRIEF OF ARGUMENT FOR APPELLEES.

That the Court below was right in entertaining the objection to the jurisdiction of the Court and in dismissing the bill, the authorities leave no room to doubt. The question was fully argued and the opinion of the Court given, after as full deliberation. In replying to the points consecutively, as stated by appellant, it would appear:

I. That "The Circuit Court for one District has no jurisdiction conferred upon it by the Bankrupt Law over actions arising out of proceedings in another District. Whatever powers it has and can exercise over such cases are in virtue of its ordinary jurisdiction."

Markson v. *Heany*, 4 *B. R.*, 165.
Bump. Bankrupt Law, p. 306.

The principle "that Courts created by written law, and their jurisdiction defined by written law, cannot transcend that jurisdiction, applies with special force to Federal Courts." *Dwarris on Stat., p.* 341.

They are creatures solely of statute. The acts creating them and defining their jurisdiction must have strict construction. Acts regulating State Courts may have more latitude, as State Constitutions may receive a more liberal construction than that of the United States.

Ib. p. 368.
Comth v. *Hartman*, 5 *H.*, 119.

The Courts of the United States are of limited jurisdiction. *Brightly's Dig.* (Dec.), *p.* 502, *pl.* 2.
U. S. v. *Tonvangala*, *Hemp.*, 304.

The jurisdiction of the Circuit Courts depends upon the Acts of Congress; they do not derive their judicial powers immediately from the Constitution.

Bennett v. *Bennett*, 1 *Deady*, 299.
U. S. Gen. Dig., 1874.

Courts of limited jurisdiction can only exercise their powers in the cases and in the mode prescribed by the Legislature. *Hunt* v. *Gray*, 3 *Snow*, 339.
Sheldon v. *Sill*, 8 *H.*, 441.

An objection to jurisdiction of a Circuit Court cannot be waived by consent. *Scott* v. *Sandford*, 19 *H.*, 393.
Bright, *p.* 302, *Sec.* 6.

Jurisdiction having once vested in the Western District, it was entire and absolute. *Hilliard*, 367–8.
1 *Blatch*, 290.

The object of the law was doubtless to keep the proceedings in the same District. Greater convenience, certainty, and safety were insured thereby, and confusion avoided.

The act of 1867 simply repeats the provisions of the act of 1841.

While the same Judges may sit in the different Districts, the Records are entirely separate—the Courts distinct—as much so for all business purposes as if the Courts were in different Circuits.

All such matters (pertaining to the Bankrupt and his Creditors, and conflicting claims and equities arising between them)—are exclusively within the jurisdiction of the Court where the proceedings are pending.

Goodall v. *Tuttle*, 7 *Bank. Reg.* 200.
Sherman et al. v. *Bingham et al.*, 5 *Ib.*, 34.
Bachman v. *Packard*, 7 *Ib.*, 353.
Jobbins v. *Montague*, 6 *Ib.*, 509.
Lamb v. *Darmon*, 7 *Ib.*, 509.

The concurrent jurisdiction conferred upon the Circuit Courts is specially given. The same reasons that would allow latitude in defining jurisdiction in matters of Bankruptcy between Federal and State Courts cannot be held to prevail between different Federal Courts. Their jurisdiction must be confined closely to its proper statutory limits.

See Bachman v. *Packard*, 7 *N. B. R.*, 358,
and cases therein cited and commented upon.

II. Want of jurisdiction over the subject matter can be taken advantage of in any stage of the cause.

Brightly, *p.* 506, *Sec.* 6, *pl.* 97.
R I. v. *Mass.*, 12 *Pet.*, 657.

May at any time before trial be objected to, by motion or plea. *Bright*, *p.* 506, *pl.* 102.
Bosbyshell v. *Oppenheimer*, 4 *W. C. C.*, 482.

Jurisdiction must appear affirmatively by the Record; the want of it need not be pleaded.

Kelly v. *Harding*, 5 *Bl. C. C.*, 502.
Mason v. *Rollins*, 13 *Wallace*, 602.

Circuit Courts will even permit a plea in bar to be withdrawn in order that defendant may plead to jurisdiction.

Bright, *p.* 506, *pl.* 104.
Eberly v. *Moore*, 24 *H.*, 147.

Want of jurisdiction in a Federal Court may be taken advantage of by a motion in arrest of judgment.

Bright, *p.* 506, *pl.* 110.
Sheddon v. *Custis*, 6 *Call*, 241.
Carter v. *Burnett*, 15 *H.*, 354.
Scott v. *Sandford*, 19 *H.*, 393.

It depends upon the subject, and not upon the parties.

Hilliard, 367–8; 1 *Blatch*, 290.

This doctrine is not applicable to the State Courts; it results from the peculiar constitution of those of the United States which are bound to decline jurisdiction of a case, if their want of jurisdiction appear *in any manner or in any stage* of the cause.

Bright Fed. Dig., *p.* 338, *pl.* 264.
Scott v. *Sandford*, 19 *H.*, 393.

III. It was manifestly not the intention of the Act of 1875 to interfere with existing cases. Under the authorities following, the constitutionality of such an Act would be doubtful. It gives only a new or enlarged jurisdiction. *Taggart* v. *McGirr*, 2 *Harris*, 155, relied upon by Appellant, provided specifically for cases pending. In considering the State authorities cited by Appellant, the strict construction to which Federal Courts as creatures of statute are held, as opposed to the greater latitude allowed State Courts, must be borne in mind. *Dwarris*, *p.* 368; *p.* 341.

The State authorities cited by Appellant are not strictly analogous, and the strongest of them (Hepburn v. Curts, 7

Watts) is express in its terms, that no constitutional prohibitions must be violated.

Appellant had a complete remedy before the Act of 1875. No reason exists for its application to this case.

The Legislature does not possess judicial power, and they have not the right to direct that a new trial be granted.

Opinion by Gibson, C. J.

De Chastellux v. *Fairchild*, 15 *Pa. State R.*, 18.

"It would be incompetent for the Legislature, by retrospective legislation, to make valid proceedings which had been had in the Courts but which were void for want of jurisdiction over the parties. Such a legislative enactment would be doubly objectionable."

Cooley, Con. Lim, p. 107.
Ib., 108, *Note.*

In *Denny* v. *Manton*, 2 *Allen*, 361, a Judge in insolvency had made certain orders in a case pending in another jurisdiction, and which the Courts subsequently declared to be void. The Legislature then passed an act confirming and validating the proceedings. On the question of its validity the Court say that the Legislature have no power to interfere with this jurisdiction in such manner as to change the decision of cases pending before Courts, or to impair or set aside their judgments, or to take cases out of the settled course of judicial proceedings.

A statute will not be construed so as to operate retrospectively on past transactions unless the language be so clear as to preclude all question as to the intention of the Legislature.

Schenck v. *Peay*, 1 *Wool*, 175.
Ex-parte Billing, 3 *Ben*, 212.

The Legislature has no power to set aside a judgment, or to empower a Court to do so, rendered before the passage of the Act, no matter how erroneous the judgment may be.

Arnold v. *Kelly*, 5 *W. Va.*, 446.

IV. The whole testimony in the case—that of the Bankrupt himself—shows conclusively that Appellees could not have had *reasonable cause* to believe him insolvent when the judgment was taken. He expressly declared his ability to pay his debts, and gave statements of assets to support it.

See Testimony, pages 13 *and* 14.

I am not certain but that Drake wanted me to take ad- " vantage of the Bankrupt Act. But I said that I did not " consider myself that bad off, for my debts were not equal " to my assets. * * I did not consider myself bankrupt on " 24th June, 1867," (date of Judgment). " I think likely " I told Mr. Drake that if I had all my business settled up " I would have about $8,000 left. * * * I told Mr. Drake " I had plenty of property, all I wanted was time to collect " in some debts."

There is clearly no evidence of *a fraudulent design* on the part of the bankrupt, *and knowledge or reasonable cause* to believe it existed on the part of the vendee.

The whole transaction shows good faith and disinterested and honest dealing on the part of Drake, Appellee. The arrangement for the interview—consultation with counsel—repeated assurances of Adams of his ability to pay—advice by Drake that if not able to pay he should go into bankruptcy—additional loan by Drake of $1500, to assist Adams in meeting pressing demands—sales of merchandise to Adams subsequently. So far from it appearing that "the fact that Mr. Adams was insolvent was communicated to defendants, and a preference was given pursuant to an arrange-

ment between the parties," as urged by Appellant, the testimony establishes the fact that Adams believed himself to be solvent; that he made Drake believe it by giving him statements of assets clearly showing him to be solvent—his liabilities appearing at about $9,000, while his assets were $23,000 in accounts, and $8,000 in stock of goods—and that instead of any arrangement between the parties to give a preference being shown, the payment of all Adams' liabilities was expressly urged by Drake, and intended and provided for in the arrangement. *Testimony, pages* 13 *and* 14.

No man appealed to as Drake was, by a debtor needing immediate help against pressing claims, could have more prudently obeyed the spirit and letter of the law, in assisting the debtor, and at the same time making provisions for the protection and payment of all creditors.

No intended preference is shown. The assignee must show this. 1 *Bank Reg.*, 169.
2 " " 101, 81, 137.
" " 123, 125.

It is quite clear that facts which are entirely sufficient for adjudicating a debtor bankrupt, on petition of his creditor, may be, and generally are, wholly insufficient to justify a decree declaring void a transfer of property or preference given to a creditor. *Bump.*, 583.
See cases cited.

The intent means an actual design in the mind, and must be proved as a question of fact. *Ib.* 585.

A mortgage given to a *bona fide* creditor cannot be declared an act of bankruptcy, as made with the intent to delay creditors, when there are neither proofs nor allegations that the debtors were insolvent at the time when the mortgage was made. *Ib.* 586.

The giving of a mortgage for a present consideration is not an act of bankruptcy.

Ex-parte Sanford, 7 *Bank Reg.*, 351.

The giving of a warrant of attorney to confess judgment, as security on which judgment may be entered at any time, by no means, of itself, raises any presumption of insolvency.

Ib., 590 *and* 591.

A mortgage given by a solvent debtor, though with intent to give a preference, is not an act of bankruptcy.

Ex-parte Denham, 2 *Ben.*, 488.

If a debtor honestly believe himself solvent, and pay a just debt, such payment cannot be deemed fraudulent, though bankruptcy ensue; otherwise, if aware of his insolvency.

Fornin v. *Crawford*, 2 *Bank Reg.*, 183.
Milter v. *Keys*, 3 " " 54.

A question of intention solely. Not a fraud, unless meant to be so. *Ibid* 548, 596 *and* 597.

There must be reasonable cause to believe that the judgment was confessed with a view to give a preference.

Irvin v. *Hughes*, 16 *Am. L. R.*, 209.

Lacking proof of a fraudulent design on the part of the bankrupt, and knowledge or reasonable cause (or of circumstances from which they might be inferred) to believe it existed on the part of the Appellees as required by the decisions cited, Appellants' cause must fall upon its merits.

It is therefore respectfully urged that the appeal be dismissed and the decree below affirmed.

W. H. ARMSTRONG,
for Appellees.